

Is the EU Commission's Rule of Law Fight about Poland already lost?

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Today, the Polish Constitutional Tribunal celebrates its 30th birthday. The city of Gdańsk has invited to a [major jubilee conference](#), with four former and one acting constitutional judge holding lectures and high-ranking guests expected from Europe: The President of the ECJ, Koen Lenaerts, will give an address, the President of the Venice Commission of the Council of Europe, Gianni Buquicchio, will attend, as will the presidents of the constitutional courts of several neighboring states. In the evening, a public panel discussion is planned.

A beautiful anniversary, no doubt: in the 30 years of its existence, the court has gained a lot of prestige all over Europe. However, there will be little mood for celebration in Gdansk today. For almost a year the court has been in a kind of state of siege. Three of the 15 judge positions are still unoccupied, two judgments unpublished, the authority of the court severely damaged. On 27 July, the EU Commission placed Poland under observation and issued a number of „[recommendations](#)“ on what the Polish authorities should do to ensure the level of rule of law required for EU membership. Otherwise, Poland is threatened with something no EU member state has ever had to face, not even Hungary: a sanctions procedure under Article 7 of the EU Treaty, which can culminate in the deprivation of voting rights in the EU. Within ten days, Poland will have to deliver steps to implement the demands. The deadline set by the Commission expires on 27 October.

I've looked around in the last few weeks in Warsaw and talked to many people with first-hand insights in these

matters. What do those who are fighting alongside the Constitutional Tribunal expect from this unprecedented „nuclear option“? What can Europe do to ensure that government and lawmakers in the 6th largest EU member state revert to obeying their own constitution? The answer: a shrug. Europe is hardly present in the constitutional political power struggle in Poland. Which is not due to the fact that the sanctioning threat is taken lightly. But what then?

Dialogue without words

In essence, the Commission is demanding three things from Poland: Firstly, the executive power should allow the three judges elected just before the change of power by today's opposition party Citizen Platform (PO), who are still waiting to be sworn in by the President of the Republic, to take up their duties. Secondly, the government is to publish all judgments of the Constitutional Court, including the judgments on the constitutional reforms of 9 March and 11 August, which the government continues to treat as illegal and refuses to publish in the Official Gazette. Thirdly, the Polish authorities should ensure that the judgments of the Constitutional Court are fully followed and that their work is not hindered.

„These demands can be fulfilled in half a day,“ says Małgorzata Szuleka from the civil rights organization Helsinki Foundation. But since they were announced on July 27th, almost nothing has happened. The dialogue continues, according to the official language rule.

One should imagine this dialogue to be a rather monosyllabic affair: the omnipotent PiS chairman Jarosław Kaczyński told the German tabloid „Bild“ that he finds the Commission's demands „[amusing](#)“, and declared the whole procedure flatly illegal under European law (the initially announced action before the European Court of Justice was never brought, though). In mid-September, Commissioner [Frans Timmermans](#), who is in charge of the case against Poland, admitted in the EU Parliament that „the dispute remains unresolved.“ That is still the case today. „We are in waiting mode,“ a commission spokesman told me. „The ball is in the field of the Polish government.“ When the last talks actually had taken place, and between whom, remained unanswered.

A lot is at stake for both sides. No-one believes that the final stage of the sanctions procedure under Article 7 will in fact be triggered and Poland deprived of its voting rights in the end – this would require a unanimous decision in the Council of the Member States and would be most likely prevented at least by Poland's ally Hungary. „The Council will never in a million years trigger Article 7 against Poland“, said the liberal Dutch EP deputy Sophia in't Veld.

But even the formal introduction of Art. 7 could cause a sudden temperature drop in Kaczyński's amusement – if not for EU policy then for budgetary reasons. The rating agencies might downgrade Poland's creditworthiness, the Polish public debt would get more expensive and the government would be forced to save drastically, rather than continue to distribute social benefits over families and others. Politically, this could be their undoing. „This is what they really take seriously,“ one of my conversation partners in Warsaw told me.

How to defuse the nuclear option

But the EU Commission is under enormous pressure, as well. According to another lawyer in Warsaw who has followed the conflict over the Constitutional Tribunal closely, it is not without reason that the article 7 procedure is called the „nuclear option“. The principle of nuclear deterrence works only as long as nobody really wants to test whether the bomb is actually ignited. „If they do, and then there is no effect – then the EU is finished.“

Perhaps the Polish government is still able to defuse the bomb – without having to abandon its goal to eliminate the Constitutional Tribunal as a potential obstacle to its policies.

The key to this is the position of the President of the Constitutional Court. The term of office of the incumbent President Andrzej Rzepliński, whosince the outbreak of the crisis has rarely missed an opportunity to plunge into the fray with the government, expires on December 19. If nothing unforeseen happens, his successor will be someone who listens to the command of the PiS or at least owes them his job. One likely candidate is Piotr Pszczółkowski, who has won Kaczyński's esteem as his lawyer in the process on the [Smolensk plane crash in](#)

[2010](#), the ur-disaster of today's PiS, where Kaczyński's twin brother Lech, then President of the Republic, was killed along with a large part of the party's elite (or, according to Kaczyński's unshakeable conviction, a murder assault by Russian agents conspiring with the former PO government).

The chances of being able to install their candidate for the office of the President of the Constitutional Tribunal have been actively increased by PiS with the most recent amendment to the law on the Constitutional Tribunal. Prior to this, the procedure provided for the judges to determine two candidates, from which the President then selected one as President of the Court. In future, there will be three candidates instead of two – which makes it very likely that one of the four PiS-nominated judges will make it to the list and then be appointed by President Andrzej Duda.

If this were successful, the new President of the Supreme Court could on his first day of office admit the three „anti-judges“ to the bench, the PiS candidates sworn in in December, whose seats were already occupied by previously elected, but un-sworn judges. Rzepliński had previously prohibited these three from taking up their office. In the meantime, the PiS has already filled three more judges' posts legally. Add to this Rzepliński's successor – equals seven, one vote short of the majority of the 15 judges. That vote the PiS will get a few months later when Rzepliński's deputy Stanisław Biernat ends his term in June 2017.

Regardless of this, December 19 is the most important date in the dispute over the Polish Constitutional Court. The President of the Constitutional Tribunal has far-reaching powers as regards the composition of the bench and the order in which the proceedings are to be taken. „Once they have their own President of the Constitutional Tribunal, they can block every decision to strike down one of their own laws“, Marcin Matczak, a law professor at the University of Warsaw, told me.

Taking this into account, Matczak said, it might be even possible that the PiS decides to generously fulfil the recommendations by the EU Commission – trusting that it will get what it wants anyway. The government could calmly publish the decisions of March 9 and August 11 – they can make them obsolete at any time by adapting the law on the Constitutional Tribunal to their wishes for the fourth time, and the new president and/or a blocking minority in the court could make sure that this law would not be declared unconstitutional all over again. Even in the dispute about the three judges still not sworn in they could yield without excessive cost. They would have to wait a bit longer to reach the majority in the court. But with a Tribunal that causes no trouble they could easily afford to take the time.

In that case, the EU Commission would look rather embarrassed. Their demands would be fulfilled pro forma, the conflict ended... and the nuclear option deprived of their detonator. The PiS would not have to worry much any more if it issued materially unconstitutional laws.

Another new law

At the moment, however, the PiS does not appear to be interested in such a pro-forma compromise. Right now, a new law is being drafted in the Sejm to regulate the status of the constitutional judges. It explicitly states that the swearing-in is crucial for the start of the exercise of office, which means that President Rzepliński would have to allow the three judges nominated by the PiS to the bench. The EU Commission would then be stupid with their „recommendation“ to allow the three judges nominated by the PO.

The [Venice Commission](#), the constitutional expert committee of the Council of Europe, has adopted another report on the independence of the judiciary on Friday, which once more sharply criticizes the current version of the law on the Constitutional Tribunal, after its already [very harsh first report](#) in March. The report can only refer to laws already adopted, though. With the new law – and two more already in the making – the PiS plays a [hare and hedgehog](#) game with the Venice Commission: their report, hardly published, will already be out of date again.

„They make it so complicated that people lose interest in the whole topic,“ said one of my conversation partners in Warsaw. „That is the intention behind it.“ After 10 months of struggle, the constitutional opposition in the country has become tired. „Most people are fed up with this whole story,“ said Adam Bodnar, the independent

Human Rights Commissioner of the Republic of Poland and one of the most visible defenders of the Constitutional Tribunal. „They are no longer following what is going on.“

Indifferent Guinea Pigs

The frustration also refers to the EU Commission. „I do not know what the EU Commission is planning,“ a lawyer told me. The whole process works like a black box; nothing happens for months, and in the meantime those who expect help from Brussels lose hope. „They wait. But for what? If they wait until December, it may be too late. “

Recently, Nils Muižnieks was in Warsaw, the Council of Europe's Human Rights Commissioner. At a panel discussion in the Office of the Polish Human Rights Commissioner, he asked representatives of the judiciary and the legal professions for their opinion about the state of affairs in the constitutional conflict. The judges and lawyers reported on the attacks that the PiS had announced or carried out against the independence of the judiciary, which had long since ceased to be confined to the Constitutional Tribunal. Muižnieks thanked them and added that he could not help but noticing one thing: „Poland is in the midst of a historically unique procedure.“ They were the „guinea pigs“ in this unprecedented legal procedure „which is supposed to help you“. But, the Human Rights Commissioner said, no one had even mentioned this procedure. „It seems that you don't expect much from it.“ Nobody disagreed.

That things are not going well has also arrived in the EU institutions. The Commission has painted itself into a corner, said Sophia in't Veld, deputy to the European Parliament. The present confrontation had brought no improvement for the rule of law and fundamental rights, only „a lot of antagonism“. This was not just the fault of the Commission. „They have no other instruments.“

The European Parliament wants to change this in the future: on October 26, one day before the deadline in the Polish case expires, an [ambitious plan](#) will be put to vote in Strasbourg, putting the monitoring of the rule of law, democracy, and protection of fundamental rights in the Member States on a permanent basis. This ongoing monitoring task will no longer be carried out by the Commission itself, but by an independent expert committee. That procedure would appear „more objective and less politicized“ and less of a finger-pointing exercise, said its initiator in't Veld. „We want the citizens to take ownership of this.“ Violations could be prevented before they even arise.

For the Polish Constitutional Tribunal such a solution would be too late, admitted in't Veld. Nevertheless, this could convince the Commission and the Council to join the Parliament's plan. „We lose the battle but win the war by coming up with a broader mechanism.“

At the Commission, at least, this may still require some persuasive work. At the recent meeting of the [Staatsrechtslehrervereinigung in Linz](#), Clemens Ladenburger held a guest lecture, a senior official in the Commission's legal service. The Commission had deliberately designed the Rule of Law Procedure in 2014 „as an instrument of reaction to individual, ad hoc threats“ and decided against permanent monitoring of the Member States, Ladenburger said (cited according to the handout distributed at the lecture). It also had decided against installing an independent expert body, relying instead on the bodies of the Council of Europe, in particular the Venice Commission. „This approach offers many advantages and has proved its worth.“ (Ladenburger emphasized to present his „purely personal views“ and not the position of the commission.)

A six-months delay?

The plan to subdue the President of the Court might still miscarry, though. The Constitutional Tribunal is not yet completely defeated. It might still declare the new nomination procedure, with three instead of two candidates, unconstitutional before the 19th of December.

This new nomination procedure had already passed the Constitutional Tribunal unscathed at a former occasion, but only for formal reasons: the appeal had not been sufficiently substantiated in that point. That does not necessarily mean, however, that the Tribunal would not follow a better reasoned argument in a new case.

A number of PO opposition deputies have brought such a case before the Constitutional Tribunal to scrutinize

the new nomination procedure. The decision is due on [November 7](#). If the court were to overturn this rule, then the President of the Republic could most likely not appoint a PiS-aligned President of the Tribunal and would therefore presumably appoint none for the time being. In that case the court's Vice-President Biernat would take over the presidency temporarily, and the court would have won a valuable half-year until Biernat's term expires in June 2017, too.

Will the Tribunal once again strike down a regulation about itself? It could have done so in August if it wanted to, one expert said. Another pointed out that only four out of the 15 current judges at the Constitutional Court are solidly backing a hard line against the PiS; some of the others might wobble under the pressure of possible reprisals. There was no lack of signals that could be understood as a threats: during the hot phase in December, a year ago, some PiS deputies had already threatened to move the Constitutional Tribunal from Warsaw to the provincial eastern town of Lublin.

On 7th of November we will know.

Black protest

How does the constitutional conflict look from the perspective of PiS and its supporters? This is not easy to find out. The government is notoriously uncommunicative. There has been an [analysis](#) from the national conservative perspective published in July by a group of experts headed by the Warsaw law professor Jan Majchrowski, commissioned by the President of the Parliament, Marek Kuchciński (PiS), to deal with the criticism by the Venice Commission. The report argues that it is not the constitution that legitimates the actions of the state organs, but the sovereign „political nation“ in the form of the majority of the parliament, which employs the law as a „tool“ to order among others the Constitutional Tribunal how to hear and decide cases. In this sense, the constitutional problem is not the impact these rules have on the effectiveness of the Constitutional Tribunal but the Tribunal's decision to disobey these rules while declaring them unconstitutional.

In mid-September, I paid a visit to *Ordo Iuris*, a legal think tank in Warsaw founded in 2013, that recently has also published a long [report](#) on the state of democracy, human rights and the rule of law in Poland. I was received by [Joanna Banasiuk](#), the vice-president of the Institute, a young legal scholar from the University of Białystok. When I asked her how she felt about the constitutional crisis in Poland, she replied that there was not any. „The Constitutional Tribunal is doing its work, handing down judgments, they get published, everything is in order. There is no crisis, a legal dispute takes place“.

Ordo Iuris is, despite its grave name, an perfectly modern and internationally well-connected affair. Since 2013, there is an office in Warsaw right next to the parliament, and since recently there is also one in Brussels. One of their aims is to fight against „social exclusion, discrimination and marginalization“, says their [website](#) – but not of threatened minorities, of gays, blacks and Muslims, but of those who feel marginalized „because of their attachment to traditional values“.

Joanna Banasiuk did not have much time for me; she had a lot on her hands. The day after our meeting she had an appointment in the Sejm, the lower house of the Polish Parliament. She [presented](#) a [bill](#) on behalf of the „Stop Abortion“ initiative, to replace the already fairly strict abortion law with a quasi-total ban, threatening even raped women who do not want to carry the child of their rapist with up to five years imprisonment.

„The Polish Constitution guarantees everyone the protection of life and requires equal treatment of all people,“ she said in Parliament. Half a million signatures had been collected by Joanna Banasiuk and the „Stop Abortion“ initiative for this design. The Sejm accepted the law at first reading and rejected an alternative draft for the liberalization of the abortion law.

That was on September 22. Shortly thereafter, the streets all over the country filled with women, [dressed black from head to foot and full of anger](#). A tight phalanx of thousands of umbrellas in the pouring autumn rain, viewed from above a picture of tremendous iconic force. Then something happened unprecedented since PiS had won the election a year before: Kaczyński gave way. The abortion ban was dumped.

Joanna Banasiuk, the orderly Ordo-Iuris activist, had a [new appearance in the Polish parliament](#) on October 6.

The „180-degree turn of the government“ was „difficult to understand,“ she complained. It was „an expression of disregard for the mechanisms of direct democracy and civil society, and to us women who want the full protection of life!“

This 180-degree turn-around could be „a turning point for the whole debate,“ said Human Rights Commissioner Adam Bodnar. „Half a year ago, everyone was afraid. But now they have shown weakness. “

The struggle for the constitutional court may be lost, according to Bodnar. The demonstrations are all the more important „because they show that civil society is still important. That they can not control everything. The Constitutional Court can no longer be our protector, so we must take care of ourselves. „

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